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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUICY COUTURE, INC., Plaintiff, v. BELLA INTERNATIONAL, LTD., a/k/a BELLA (d/b/a Juicy Girl and JUICYLICIOUS), Juicy Girl, LTD., GOLD STABLE INTERNATIONAL LTD., GOLDSTABLE INTERNATIONAL CORPORATION, JOHN SUEN, ALISON LAW, JESSICA CHING PING YANG and JOHN DOES 1-10, Defendants.	: : : : : : : : : : : : : x	**ECF CASE** Civil Action No. 12-5801-RA District Judge Ronnie Abrams

OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Contrary to the attempts of Juicy Couture, Inc. ("Plaintiff") to characterize the Defendants in this action as unscrupulous opportunists, the Defendants, and most notably the first named Defendant Bella International, Ltd. ("Bella"), are anything but the sinister counterfeiters that Plaintiff incorrectly seeks to portray. Rather, the Defendants, and Bella in particular, are well-established, well-respected businesses with fame, goodwill, and a superior claim to the Juicy Girl trademark, at least in Hong Kong. Plaintiff has known about the Defendants' activities and their use of the Juicy Girl mark since at least as early as the date Plaintiff initiated litigation against the Defendants in Hong Kong in 2008 on essentially the same grounds it now asserts in this action. And, Plaintiff has known about Defendants' sales in the United States (less than $3,000 in total) since at least April 2, 2012.

No preliminary injunction is appropriate here. There are no emergent circumstances. And Plaintiff is unable to overcome its sizable burden of proof. In fact, this whole matter reflects an over four year old international trademark dispute being heard in Hong Kong as to rights in the Juicy Girl mark between Plaintiff and Defendants, and in which Defendants will show they, not Plaintiff, have superior rights to the Juicy Girl mark.

Insofar as the efforts of Plaintiff to circumvent the authority of the Hong Kong courts, Plaintiff seeks to distort the nature of the dispute by improperly accusing Defendants of counterfeiting and other grievous wrongs. As will be shown, Plaintiff is unable to sustain any of the prongs associated with the preliminary injunction test. Moreover, as attested to by John Suen, a number of key assertions by Plaintiff in support of its efforts for preliminary injunctive relief are false. As to the www.juicygirl.com.hk website, it is maintained in Hong Kong, operated in Hong Kong, for the purpose of doing business in Hong Kong, by a Hong Kong business. Consequently, this Court has no authority, especially not in an emergent setting such as this, to order the relief Plaintiff seeks.

II. JURISDICTION

For the limited purposes of defense against Plaintiff's preliminary injunction motion, counsel appears for all of the Defendants except Alison Law. Objection to the jurisdiction of this Court over the other individual Defendants, specifically John Suen and Jessica Ching Ping Yang, are expressly reserved. These individuals are not citizens of the United States, nor do they meet any of the other requirements for this Court to exercise personal jurisdiction over them.

III. FACTUAL STATEMENT

A. The Parties

Defendants Bella International, Ltd. (a/k/a Bella (d/b/a Juicy Girl And Juicylicious)), Juicy Girl, Ltd., Gold Stable International Ltd., Goldstable International Corporation, John Suen, and Jessica Ching Ping Yang (collectively "Bella"), co-founded Bella Boutique Shop in Hong Kong back in 1997. (Suen Decl. ¶ 1.) The Bella Boutique Shop is a predecessor in interest to Gold Stable International Ltd. founded in 1998. Bella International, Ltd. is its successor. (*Id.*) Plaintiff, an American apparel corporation, would have this Court consider this matter as a run-of-the-mill counterfeiting case against a foreign counterfeiter. (Pl. Br. 11.) In reality, this case is the result of a jurisdictional trademark dispute that began more than four years ago in the Hong Kong courts against Bella, who independently created the Juicy Girl brand in about early to mid 1998, and has been in continuous use of that brand in Hong Kong and throughout Asia ever since. (*Id.* at 16; Suen Decl. ¶ 8.)

B. Bella And The Origins Of The Juicy Girl Mark

To decide the legal issues in this case, the Court must first understand the circumstances by which Bella came to create the Juicy Girl brand that is in dispute. It is important to note that

Bella adopted the Juicy Girl name without any knowledge of Plaintiff. (Suen Decl. ¶ 3.) As set forth in John Suen's declaration, he independently created the Juicy Girl brand for Bella based on his daughter's nickname "Juicy," who was born in 1995. (*Id.*) As laid out by Plaintiff in its moving papers, this was well before the origins of Plaintiff's alleged mark. (Pl. Br. 1.) Mr. Suen explains that he came up with the name Juicy after the birth of his first child based on a bottle of plum juice next to his wife's bedside cabinet at the hospital where she gave birth. (Suen Decl. ¶ 3.) Several years later in 1998, when he adopted the name Juicy from his daughter to include in a trademark for the business, he added the word "Girl" to reflect the nature of the feminine apparel that made up the business. (*Id.* ¶¶ 2-3.) Besides the Juicy Girl brand, Bella also operates under the brands Alyce and Ashlee, which are riffs on the first name of Mr. Suen's daughters, Alice and Ashley. (*Id.* ¶ 3.)

C. The Success Of Bella

By no means is Bella a counterfeiting operation; it is a well-known, well-established, and highly regarded company within its primary regions of operations, specifically Hong Kong, the People's Republic of China, and Macao. (*Id.* ¶ 4.) Based in Hong Kong, Bella is a designer, manufacturer, retailer, and wholesaler of apparel and other clothing accessories. (*Id.* ¶ 6.) The Juicy Girl brand products are designed by Bella's team of in-house designers, and are in many different styles, only one of which is the California style about which Plaintiff complains. Customers are able to buy these products through stand-alone brick and mortar stores and online. (*Id.*) A picture of one of Bella's stores in Xian, China can be seen online at http://juicygirl.com.hk/en/news.php. (*Id.* ¶ 7.) Through its predecessor, Bella's first stand-alone brick and mortar store was opened in Hong Kong in 1997. (*Id.*) Success followed. Bella's thriving business now operates over 15 stores: eight in Hong Kong; more than six in the People's

Republic of China; and one in Macao. Plans are extant to open 30 more stores within the next three years in the People's Republic of China and Hong Kong. (*Id.*)

Through time, hard work, and significant financial investments, Bella has developed its own brands and styles that are particularly well recognized in Asia. (*Id.* ¶ 8.) Moreover, it has developed a substantial amount of goodwill with its marks such as Juicy Girl, and its customers have come to associate these brands with Bella and its products. (*Id.*) As part of the establishment and protection of its brands, Bella owns trademark registrations to identify its apparel and accessory lines in Macao for Juicy Girl, and in the People's Republic of China, Hong Kong, and the United States (U.S. Trademark Registration Nos. 4,161,859 and 4,161,860) for the trademark Just Glam. (*Id.*) However, the Juicy Girl mark is Bella's primary brand, which was first created, launched, and used in Hong Kong in about early to mid-1998, and has been in continuous use in Hong Kong and throughout Asia ever since. (*Id.*)

In acknowledgement of Bella's creative style, it has received accolades for its products and business and has been awarded the Best Visual Merchandising award in the Retail Service Industry. (*Id.* ¶ 9.) In its capacity as an industry mainstay, Bella also performs charitable functions such as sponsoring student performed fashion shows at schools using clothing and accessories provided by Bella. (*Id.* ¶ 10.) One such school where Bella performs charitable functions is the King George V School located in Hong Kong. (*Id.*) The school is one of the oldest in Hong Kong, having been founded in 1894. (*Id.*) Other similar fashion shows have been held at the Canadian International School and Hong Kong International School, both in Hong Kong. (*Id.*) Bella's products have been featured in fashion shows in collaboration with famous brands such as DUCATI and ISA KNOX, and have been featured and promoted by Hong Kong celebrities such as the singer JW, Sarah Sang, and Erica Yuen, among others. (*Id.* ¶ 11.)

Bella's primary business has been and is directed toward Asia where it spent more than $2,000,000 Hong Kong ($258,000 US) in each of the last two years on marketing and advertising directed toward those consumers, most notably in Hong Kong and the People's Republic of China. (*Id.* ¶ 12.) Bella manages its marketing campaigns largely with in house staff, and at times enlists the services of third parties who predominantly specialize in marketing and advertising in Hong Kong and China for specialized promotions such as its fashion shows. (*Id.*) These promotional activities are commonly in English and Chinese, both of which are official languages in Hong Kong. (*Id.*) As a result of Bella's marketing and design efforts, its worldwide sales in 2011 were in excess of $100,000,000 Hong Kong ($12,900,000 US). (*Id.* ¶ 13.)

D. Bella's Handful Of Sales To The United States

In addition to its brick and mortar stores, Bella also generates business from orders received through its Hong Kong based www.juicygirl.com.hk website. (*Id.* ¶ 14.) The site originates from and is maintained in Hong Kong, and is the only website Bella owns that is currently capable of accepting online orders. (*Id.*) This is the only website from which products were ever sold, albeit just a handful, to the U.S. (*Id.*) Further, Bella also previously sold its products through the website www.alibaba.com, no sales were ever made to the United States and no sales whatsoever have been made through this website since 2010. (*Id.* ¶ 18.)

In its normal course of business, Bella does not direct its advertising or marketing to the U.S. (*Id.* ¶ 15.) Indeed, Bella's total sales for all time in the United States, which have only been from its www.juicygirl.com.hk website, is less than $3,000 US. (*Id.*) Even this tiny number is higher than would ordinarily be the case were it not for the coercive tactics of Plaintiff to induce sales made by Bella to private investigators hired by Plaintiff for purposes of this lawsuit. (*Id.*; Bunckner Decl. ¶ 5; Tarbutton Decl ¶ 4; Munno Decl ¶ 4.) One of Plaintiff's several investigators confirms that she received a shipment from Bella on April 2, 2012, which must have been ordered far earlier than that. (Bunckner Decl. ¶ 10.) As shown by the e-mail chain between Bella and Plaintiff's private investigator, one such purchase to Plaintiff's private investigator occurred only as a result of badgering by the private investigator. (Suen Decl. ¶ 14.) In an act of goodwill to satisfy the order, Bella specifically stated that it was trying to satisfy the "customer's" needs a/k/a the investigator's needs "on an exceptional basis." (*Id.*)

In an ultimate example that no good deed goes unpunished, Plaintiff attempts to use these *de minimis* sales as a basis for its assertion that Bella is allegedly acting in bad faith for coming into "Plaintiff's backyard." (*Id.* ¶ 15; Pl. Br. 16.)

E. Bella's Business Is Primarily Directed Toward Asia

Like many businesses in Hong Kong, Bella's sales on its www.juicygirl.com.hk website are administered through PayPal. (Suen Decl. ¶ 17.) Contrary to Plaintiff's assertion, representation of U.S. dollars on the PayPal printout does not imply that a particular order originated from the U.S. (*Id.*; Pl. Br. 7) Rather, for accounting purposes, money received from customers through www.juicygirl.com.hk is transacted in U.S. dollars via PayPal even if the initial payment is in a local currency. (Suen Decl. ¶ 17.) In a usual and customary practice for Hong Kong businesses using PayPal, it then converts the payments to Hong Kong dollars when Bella withdraws money from the account. (*Id.*)

Bella's advertising activities in Asia include advertising on its social media accounts with Facebook and Twitter, as well as through social media largely directed to customers in the People's Republic of China using Sina Weibo. (*Id.* ¶ 19.) All these accounts are used just for promotion of its business and brands in Asia, and absolutely no orders for products are taken from the social media sites. (*Id.*) Any postings and "tweets" through these sites regarding Bella's business and products are not directed toward customers in the United States, but rather, to its Asian customers, notably in Hong Kong. (*Id.*) Although Bella does receive "likes" on

Facebook, contrary to statements made by Plaintiff, the vast majority of the "likes" are from people in Hong Kong. (*Id.*; Pl. Br. 7.)

Statements made by Plaintiff that Twitter and Facebook are unavailable in Hong Kong are incorrect; both social network sites actively operate in Hong Kong. (Suen Decl. ¶ 22.) In particular, these sites are used by local Hong Kong organizations, such as the Hong Kong Tourism Board, the Hong Kong edition of *Time Out* magazine and Hong Kong celebrities on such sites as twitter.com/hongkongtourisim; twitter.com/timeouthk; and twitter.com/hkceleb. (*Id.*)

In addition to its www.juicygirl.com.hk website, Bella controls the websites: (1) www.juicylicious.us, which has not been updated for years; (2) www.juicygirl.us, which is inactive and not owned by Bella; and (3) www.justglam.us, which depicts an "under construction" page. (*Id.* ¶ 20.) Absolutely no U.S. sales have ever been made through any of these websites, and no products are currently offered for sale anywhere in the world using any of these websites. (*Id.*) These alternative sites to Bella's primary website www.juicygirl.com.hk were obtained for Bella by a third party information technology company. (*Id.*) Purely as a matter of convenience, the ".us" top level domain was picked as the next best alternative to the ".com" top level domain, which was already taken for "juicylicious," "juicygirl," and "justglam." (*Id.*)

F. The Hong Kong Trademark Dispute

In 2008, Plaintiff sued Bella in Hong Kong for allegedly, among other things, palming off and related trademark counts. (Suen Decl. ¶ 25.) It appears Plaintiff has not candidly revealed to the Court that this lawsuit is ongoing and hotly contested. (*Id.* ¶ 25; Pl.Br. 16) Indeed, Plaintiff offered to pay Bella $300,000 U.S. to settle the case as recently as earlier this year. (Suen Decl. ¶ 25.) Bella declined this offer, believing that it was the first to use the Juicy

Girl mark in Hong Kong. (*Id.* ¶¶ 25, 27.) Plaintiff's suit in Hong Kong against Bella will likely go to trial the end of this year or the first quarter of next year. (*Id.* ¶ 28.) Meanwhile, in an effort by Plaintiff to end run the judicial process in Hong Kong, it filed the present motion for a preliminary injunction in the United States based on the less than $3,000 US worth of sales. (*Id.*)

G. Offer To Resolve The United States Preliminary Injunction

To resolve the preliminary injunction issue, Bella offered a straightforward compromise that it would undertake to decline fulfillment of any order to be shipped to a United States address. (Suen Decl. ¶ 30.) This was an easy offer for Bella to make given the virtually nonexistent sales in the United States. (*Id.*) However, Plaintiff refused the offer, and insisted instead that Bella transfer the www.juicygirl.com.hk website to Plaintiff. (*Id.* ¶ 31.) Plaintiff's counteroffer was made with full knowledge that Bella's Asian business depends significantly on the operation of that website for sales in Hong Kong and elsewhere, and that the ".hk" site originates in, operates from, and serves the Hong Kong community. (*Id.*) The impossibility of accepting Plaintiff's request, further demonstrates its intent to abuse the U.S. preliminary injunction legal device as an effort to end run the upcoming Hong Kong trial. (*Id.* ¶ 32.)

IV. LEGAL ARGUMENT

A. Plaintiff Is Not Entitled To A Preliminary Injunction Because It Cannot Carry Its Burden

In order to justify a preliminary injunction, Plaintiff must demonstrate: (1) irreparable harm absent injunctive relief; (2) either (a) a likelihood of success on the merits, or (b) a serious question going to the merits to make them a fairground for trial, with a balance of hardships tipping decidedly in the movant's favor; and (3) that the public's interest would not be disserved by the issuance of a preliminary injunction. *Salinger v. Colting*, 607 F.3d 68, 79-80 (2d Cir. 2010). "A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a *clear showing*, carries the burden of persuasion." *Sussman v. Crawford*, 488 F. 3d 136, 139 (2d Cir. 2007) (emphasis in original).

Plaintiff cannot come close to establishing its entitlement to the extraordinary relief of a preliminary injunction. It cannot establish irreparable harm. It has delayed many months, if not years, in seeking emergent relief. It is not likely to succeed on the merits. The balance of hardships tips squarely in favor of Defendants' well-established Hong Kong-centric business. And, the Court lacks jurisdiction over the www.juicygirl.com.hk domain name.

B. Irreparable Harm Is Absent Because Plaintiff Delayed In Seeking Relief

1. A Four-Month Delay Negates Irreparable Harm

The Second Circuit has repeatedly emphasized that, "[a] showing of irreparable harm is 'the single most important prerequisite for the issuance of a preliminary injunction.'" *Faiveley Trans Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quoting *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999)). The burden of proving irreparable harm lies with the moving party. *Salinger*, 607 F.3d at 82. If the movant fails to make a showing of irreparable harm, the motion for a preliminary injunction must be denied. *See Rodriguez*, 175 F.3d at 234. Undue delay precludes a finding of irreparable harm.

By its own admission, Plaintiff delayed at least four months seeking emergency relief. (Bunckner Decl. ¶ 10, stating Plaintiff received a package in California from Bella in Hong Kong on April 2, 2012.) This delay alone defeats any claim of irreparable harm. But Plaintiff's delay, in fact, may be as long as four years when, in 2008, the date it filed suit against the Defendants in Hong Kong asserting the same trademark issues as it does here. Plaintiff attempts to clear this hurdle by going around it, ignoring the specific facts of the case, and blindly claiming that in trademark infringement cases there is a presumption of irreparable harm. (Pl. Br. 9.)

2. **Irreparable Harm Is Not Presumed**

Courts in the Second Circuit have called into question the presumption of irreparable harm in trademark cases, consistently holding any such presumptions are "inoperative" if Plaintiff has delayed in moving for a preliminary injunction. *Poon v. Roomorama, LLC*, No. 09 Civ. 3224, 2009 WL 3762115, at *3 (S.D.N.Y. Nov. 10, 2009) (quoting *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995)); *Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 144 (2d Cir. 2005) (citing *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2d Cir. 1985)). Indeed, although Plaintiff tries to sweep it aside in a footnote, even where delay is absent, this Circuit has called into serious question the automatic presumption of irreparable harm in the event of infringement of a Federal trademark registrant. And, it is noteworthy that the presumption only applies (if it applies at all) to federally registered trademarks.

Even assuming *arguendo* that a presumption of irreparable harm is proper, it is unquestionably defeated by delay in seeking injunctive relief. *Life Techs. Corp. v. AB Sciex Pte. Ltd.*, No. 11 Civ. 325, 2011 WL 1419612, at *7 (S.D.N.Y. Apr. 11, 2011) (citing *Weight Watchers*, 423 F.3d at 144). This Court has refused to grant a preliminary injunction when a moving party has waited for far less time than the at least four months Plaintiff waited here (noting "[C]ourts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months"). The Court reasons "the failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Id.* (quoting *Citibank*, 756 F.2d at 277).

In *Citibank*, the Second Circuit held that the plaintiff failed to demonstrate irreparable harm where it did not seek an injunction until "more than ten weeks after it learned directly" of the alleged infringer's plan and "more than nine months after it received notice" of those plans. *Citibank*, 756 F.2d at 276. Later, the Second Circuit remarked that it has "found delays of as little as ten weeks sufficient to defeat the presumption of irreparable harm that is essential to the issuance of a preliminary injunction." *Weight Watchers*, 423 F.3d at 144 (citing *Citibank*, 756 F.2d at 276-77).

In this case, Plaintiff has failed to explain its admitted four-month delay in its own papers for seeking the injunctive relief presently under consideration. (Pl. Br. 9; Buncker Decl. ¶ 10; Samuelson Decl. ¶ 15.) This unexplained delay is dispositive alone, and rebuts any presumption of irreparable harm. *See, e.g., Life Tech.*, 2011 WL 1419612.

3. Plaintiff Admits To At Least A Four-Month Delay

It is undisputed that Plaintiff extensively investigated Bella's brand and product line. (Buncker Decl. ¶ 10; Munno Decl. ¶ 4; Samuelson Decl. ¶ 15.) As confirmed by Plaintiff's own investigator, it had notice from at least April 2, 2012, when it received the allegedly infringing products it ordered from Bella's Hong Kong based website, www.juicygirl.com.hk. (Buncker Decl. ¶ 10.)

Moreover, Plaintiff's ongoing Hong Kong litigation against Bella, commenced in 2008, buttresses Plaintiff's roughly four-year knowledge of the extent of Bella's brand and product offerings. (Pl. Br. 16; Suen Decl. ¶ 25.) Plaintiff has been less than candid about the active ongoing litigation in Hong Kong. This has been a fiercely fought contest. The Hong Kong trial is up-coming, and Bella is confident it will prevail. Indeed, Plaintiff offered a $300,000 cash settlement offer to Bella early in 2012, which Bella refused. (Suen Decl. ¶ 25.)

4. Irreparable Harm Is Absent

Plaintiff sat on its rights to claim injunctive relief for at least four months, and most likely much longer. (Pl. Br. 16; Suen Decl. ¶ 24.) If it is indeed Plaintiff's practice generally to actively and immediately enforce its alleged mark as claimed, it failed to do so here. (*See* Samuelson Decl. ¶ 13.) Apparently, Plaintiff only determined that it should pursue an injunction in the United States, because the Hong Kong action has not proceeded its way, and settlement talks with Bella broke down. (Suen Decl. ¶ 28.) Under these undisputed facts alone, Plaintiff's undue delay in seeking an injunction undercuts any presumption (assuming such a presumption exists) of the irreparable harm necessary to grant a preliminary injunction. *See, e.g.*, *Grout Shield Distribs., LLC v. Elio E. Salvo, Inc.*, 824 F. Supp. 2d 389, 393 (E.D.N.Y. 2011) (holding where plaintiff waited five months after settlement negotiations between the parties broke down to move for a preliminary injunction, "plaintiff's delay in bringing its preliminary injunction motion was unreasonable and undercut plaintiff's argument that its injury was actual and irreparable").

In sum, Plaintiff has known about Bella's brand for at least four years, and of United States sales for at least four months (if not much longer), and only now seeks a preliminary injunction for its "presumed injury." Further, as to the www.juicygirl.com.hk website that is in part the target of this motion, surely Plaintiff has known about at least this in connection with the Hong Kong lawsuit for several years. Such a lengthy and unexplained delay defeats any argument by Plaintiff that it will be irreparably harmed absent injunctive relief.

C. Plaintiff Is Unlikely To Succeed On The Merits

1. Defendants Run A Long Operating, Successful Business In Asia

Plaintiff is unlikely to succeed on its Lanham Act and New York common-law claims because Bella (1) has a genuine and valid trademark, and (2) has been acting in good faith by marketing its brand Juicy Girl in Asia through its Hong Kong based website www.juicygirl.com.hk. (Suen Decl. ¶ 14.) Although Plaintiff tries to evoke a visceral reaction by accusing Bella of being a "counterfeiter," this case is not about counterfeiting. Rather, as Plaintiff has deliberately pointed out only incidentally in its moving papers, this is a jurisdictional trademark dispute between two parties that has been actively litigated in Hong

Kong since 2008. (Pl. Br. 16.) Plaintiff cannot avoid the fact that Bella will be able to prove that it was the first to develop the brand Juicy Girl and to use it in commerce in at least Hong Kong. (Suen Decl. ¶ 27.) That fundamental fact undermines virtually every argument in Plaintiff's brief regarding its likelihood of success.

While Plaintiff's legal case in Hong Kong is collapsing around it, Plaintiff attempts to come to this Court and call the Defendants "opportunists." (Samuelson Decl. ¶ 13.) Nothing could be further from the truth. (Suen Decl. ¶¶ 21, 27.) Bella is a legitimate, well-established Hong Kong business. (*Id.* ¶ 4.) It has been successfully marketing its Juicy Girl fashions over the Internet and in Asia through brick and mortar stores for over 14 years. (*Id.* ¶ 7.) It seems curious at best, disingenuous at worst, that Plaintiff accuses Bella of acting in bad faith for "now coming into Plaintiff's backyard," when it was well aware of Bella's Hong Kong websites from at least as far back as the beginning of the Hong Kong lawsuit in 2008. (*Id.* ¶¶ 24-25.)

2. Contrary To Plaintiff's Statements, PayPal And Social Media Are Widely Used In Asia

Contrary to Plaintiff's assertions, neither Bella nor any of the Defendants is "now coming" or has plans presently to start business in the United States. Bella's business has been and is directed toward Asia; Hong Kong, Macao, and the People's Republic of China, in particular. (*Id.* ¶ 12.) Like many businesses in Hong Kong, Bella uses PayPal to execute online transactions. (*Id.* ¶ 17.) Assertions by Plaintiff that Bella's use of PayPal shows an intention to sell to and focus on the United States are simply wrong. (*Id.*) PayPal is commonly used by Hong Kong businesses for payment in Hong Kong and China, and Bella commonly receives payment using PayPal from its customers in Hong Kong and the People's Republic of China. (*Id.*)

Likewise, Bella's maintenance of Twitter and Facebook accounts reflects contemporary business norms. (*Id.* ¶ 19.) Plaintiff's misguided attempt to label these tools as somehow unique to U.S. business, defies the social media trend of the 21st century throughout the world. (Pl. Br. 7.) The bottom line is that tools such as Facebook and Twitter are located and used to connect local communities within various countries, including China and Hong Kong. (Suen Decl. ¶¶ 19, 22.)

Plaintiff is flatly wrong to assert that Twitter is not available in Hong Kong. It is. And, it is used by prominent Hong Kong celebrities and Hong Kong business organizations such as the Hong Kong Tourism Board and the Hong Kong edition of *Time Out* magazine. (*Id.* ¶ 22.) While Facebook is blocked in China, its Chinese counterpart, Sina Weibo, on which Bella is active, is robust. (*Id.* ¶ 19.) As for Bella's marketing and related activities, of course, they are in English and Chinese, as these are the official languages of Hong Kong. (*Id.* ¶ 12.)

3. For All Intents And Purposes, There Are No Sales In The United States

The majority of Bella's marketing is focused on Asian customers, notably Hong Kong, Macao, and the People's Republic of China. (*Id.* ¶ 19.) Bella's products, including those offered under the Juicy Girl brand, are sold in brick and mortar stores located in these three countries. (*Id.* ¶ 7.) Bella sells products on the Internet exclusively through its website www.juicygirl.com.hk. (*Id.* ¶ 14.) Although Bella does have some other Internet sites with a ".us" tag, this was done out of convenience, not design. (*Id.* ¶ 20.) In any event, those sites are also hosted in Hong Kong, and merely displayed Bella products without any interactive purchasing capacities. (*Id.*) Bella has since deactivated those sites long before this lawsuit commenced. (*Id.*) Bella only uses the Hong Kong site juciygirl.com.hk for online transactions. (*Id.* ¶ 14.)

All the foregoing notwithstanding, to date, total sales to the United States, which have only been from the ".hk" Hong Kong site, are less than $3,000 US. (*Id.* ¶ 16.) Further, it appears that a number of such sales were to Plaintiff's own private investigators. (*Id.*) In light of these facts, Plaintiff's attempt to assert that Bella is acting in bad faith because of its *de minimis* U.S. sales is plainly incorrect. Thus, Plaintiff's motion should be denied.

4. Bella's Use Of Juicy Girl

Bella uses the Juicy Girl mark as its principal mark to identify its feminine products. (Suen Decl. ¶ 8.) As attested, the word "Juicy" arose because it is the nickname Mr. Suen, a director of Bella, gave to his daughter virtually at birth. (*Id.* ¶ 3.) The word "Girl" was added to reflect the gender of the apparel offered. (*Id.*) The adoption by Bella and its predecessors of the Juicy Girl mark, and the question of who as between Plaintiff and Bella has superior rights to the Juicy Girl mark in which jurisdictions, is the subject of vigorous dispute around the world, including in the four-year long dispute in the Hong Kong courts.

Bella has openly used the Juicy Girl mark throughout Asia, its principal market. And, it has used the color pink (traditionally associated with young girls) because it is a hallmark of feminine apparel. Without support, Plaintiff asserts that it somehow has rights to the color pink for clothes. In any event, it is Plaintiff who first adopted the color pink and the tone in dispute, and Plaintiff who changed its color to be more similar to that of the Defendants.

D. Bella's Business Will Be Crippled Should An Injunction Be Granted

1. The Requested Relief Could Shutter Bella's Business

Although Plaintiff cannot demonstrate irreparable harm, Bella's business would be irreparably crippled should the requested injunction be granted to Plaintiff. *See Buffalo Forge Co. v. Ampco–Pittsburgh Corp.*, 638 F.2d 568, 569 (2d Cir. 1981) (holding that "the movant must show that the harm which he would suffer from the denial of his motion is 'decidedly' greater than the harm his opponent would suffer if the motion was granted"). Bella would lose its ability to operate over the Internet through its Hong Kong based website www.juicygirl.com.hk, thus losing a major source of its revenue stream, should the Court grant Plaintiff's motion. (Suen Decl. ¶ 14.)

Bella has spent many years marketing its brand, at a considerable personal and financial cost, and in doing so has generated an enormous amount of brand recognition and goodwill in Asia. (*Id.* ¶¶ 7-8, 23.) Bella's products have been featured in Asian fashion shows and Bella itself won several awards. (*Id.* ¶¶ 8, 9.) Its brand did not become well known in Asia overnight. Bella's success has been the product of a well-crafted marketing plan by its in-house staff. (*Id.* ¶ 12.) The goodwill that is associated with Bella's brand in Asia is dependent upon customers being able to access its products. (*Id.* ¶ 8.) Currently, Bella's Hong Kong website is the only way customers can order its products without going into one of its stores. (*Id.* ¶ 14.)

Plaintiff both ignores the manifest hardships to Bella and makes no effort to identify its specific hardships that mandate extraordinary relief. Rather, it rests on the presumption that if infringement is found, the harm Plaintiff faces is "irreparable." (Pl. Br. 19.) As discussed above, even if this presumption still exists, Plaintiff has failed to establish that it is entitled to it. Bella, however, has expended considerable resources to generate customer goodwill in Asia, which will be lost if Plaintiff's injunction is successful. (Suen Decl. ¶ 8.) Moreover, Bella's business model is primarily focused on the Asian markets, and Bella has only sold less than $3,000 of its product to the United States, a large chunk of which can be attributed to sales to Plaintiff's private investigators, such minimal sales could not have had an irreparable impact on Plaintiff's business.

2. Plaintiff's Real Motives Are Clear:
To Shut Down Defendants' Business

The intent of Plaintiff to use this litigation as a tactic to disrupt or destroy Defendants' business is obvious from its response to Defendants' efforts at compromise. To resolve the preliminary injunction issue, Bella offered to decline any order received by www.juicygirl.com.hk that would ship to a U.S. address. (*Id.* ¶ 30.) This offer was refused. (*Id.* ¶ 31.) Refusal of the offer makes manifest Plaintiff's real intention: to disrupt Bella's business and pressure a settlement of the Hong Kong case. Why else would Plaintiff refuse Defendants' offer, which amounted to a win for Plaintiff? The answer is that Plaintiff wants to fight the Hong Kong trademark case in the United States. This was starkly evident when Plaintiff demanded that Bella transfer the www.juicygirl.com.hk website over to Plaintiff's control, presumably to use as Plaintiff saw fit. (*Id.*) As Plaintiff knew, this was an impossible term for Bella to accept and it was tantamount to forfeiting the goodwill Bella has developed in Asia for www.juicygirl.com.hk. (*Id.* ¶ 32.)

Without question, the hardship facing Defendants if the relief being sought is granted far outweighs the purported harm to Plaintiff. If the hardship faced by one party is nonexistent, there is a strong likelihood that the balance weighs in favor of the party that will be more greatly harmed by the injunction. *See, e.g., Grout Shield,* 824 F. Supp. 2d at 419 (finding that the plaintiff failed to demonstrate an effect on its business and where the defendant had invested a significant amount of money into its business relationships and product "the balance of hardships [did not] weigh decidedly in plaintiff's favor").

E. An Injunction Would Disserve The Public

An injunction would further waste the Court's resources on a jurisdictional trademark dispute that will soon go to trial in Hong Kong. (Suen Decl. ¶ 28.) For judicial economy, the courts must be mindful "to prevent the waste 'of time, energy and money' and to 'protect litigants . . . and the public against unnecessary inconvenience and expense.'" *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (internal citations omitted). In the present case, Plaintiff attempts to stifle Bella's rights in Hong Kong by utilizing the U.S. court system. Such waste of judicial resources to affect the outcome of a foreign litigation evokes the caution expressed above by the Supreme Court. (Suen Decl. ¶ 28.) Practically speaking, if the Hong Kong litigation had been going favorably for Plaintiff, it would not have pursued this matter and wasted the Court's time and energy to consider this extraordinary relief. (*Id.*) For these reasons, an injunction should be denied.

V. THIS COURT LACKS JURISDICTION OVER BELLA'S HONG KONG WEBSITE JUICYGIRL.COM.HK

Plaintiff's motion for an injunction is predicated on a false premise that this Court has jurisdiction over Bella's Hong Kong website www.juicygirl.com.hk based on the *de minimis* sales made to the United States. The Second Circuit has set forth a three factor test to determine whether the Lanham Act can reach allegedly infringing activity that takes place aboard: (1) whether the defendant is an American citizen; (2) whether the relief sought would create a conflict with foreign law; and (3) whether the defendant's actions have a substantial effect on United States commerce. *Atl. Richfield Co. v. Arco Globus Int'l Co.*, 150 F.3d 189, 192 (2d Cir. 1998) (citing *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 643 (2d Cir. 1956)). In *Vanity Fair*, the court stated that "the absence of one of the [first two] factors might well be determinative and the absence of both is certainly fatal." *Id.* (quoting *Vanity Fair*, 234 F.2d at 643). Later, this Court explained that it had "never applied the Lanham Act to extraterritorial conduct absent a substantial effect on United State commerce." *Id.* (citing absence of "evidence that domestic consumers have been misled or have come to view the [Plaintiff's] mark less favorably as a result of [the] foreign activities" in declining to find substantial effect on United States commerce).

Given the nature of the Internet, the mere existence of a website does not show that Bella is directing its business activities toward every forum where the website is visible. *See, e.g., Trintec Indus., Inc. v. Pedre Promotional Prods.*, 395 F.3d 1275, 1278-81 (Fed. Cir. 2005) (where forum sales of about $4,176 amounted to a minimal part of defendant's multi-million dollar business and the mere "ability of [forum] residents to access the defendants' websites . . . does not by itself show any persistent course of conduct by the defendants in the [forum]").

In the present matter, Plaintiff's motion fails the test laid out in *Vanity Fair*. First, Bella is not an American company. It is a Hong Kong based corporation with its primary business located and directed toward Asia. (Suen Decl. ¶¶ 6, 12.) Second, Bella is actively engaged in an ongoing lawsuit with Plaintiff that will soon go to trial in Hong Kong. (*Id.* ¶¶ 25, 28.) This trial will establish Bella as the true owner of the mark Juicy Girl in at least Hong Kong. (*Id.* ¶ 27.) Any injunction issued from this Court ahead of a judicial decision in that matter will clearly interfere with Bella's rights as it pursues them overseas. (*Id.* ¶ 28.) Finally, as discussed above, Bella has only sold approximately $3,000 worth of merchandise to the U.S., with a notable portion going to Plaintiff's investigators in furtherance of the present litigation. (*Id.* ¶ 16.) This *de minimis* amount is far from substantially affecting U.S. commerce. Taking these facts in the aggregate, Plaintiff's motion isn't just flawed, it is fatally flawed. *See Vanity Fair*, 234 F.2d at 642. Thus, Plaintiff's request for a preliminary injunction should be denied.

VI. CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's motion for the extraordinary relief of a preliminary injunction.

Respectfully submitted,

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